

The ALJ found that although the claimant is entitled to temporary total disability benefits for the days he missed work due to his symptoms, he failed to provide an exact accounting of those days and therefore denied the claimant's request for additional TTD.

The claimant requests review of the ALJ's decision to deny him additional TTD benefits. Claimant argues that his bilateral shoulder condition made it difficult to continue his work duties even in his accommodated position and as of July 23, 2003, he was no longer able to work. He maintains that his symptoms continued until September 2, 2004, when he was released by Dr. Hood. Thus, claimant contends he is entitled to continuous TTD benefits from July 23, 2003 to September 2, 2004.<sup>1</sup>

Respondent argues that an accommodated light duty job was made available to the claimant and therefore he is not entitled to additional TTD benefits. Moreover, respondent contends that it overpaid TTD benefits and is entitled to a credit for \$2,181.28 in overpaid benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The parties have resolved all issues relating to this claim but one. Thus, any discussion of the underlying facts will be limited to those relevant to the single issue presented in this appeal.

Claimant maintains he is entitled to 47.00 weeks of additional TTD benefits for the following periods:

8/1/03<sup>2</sup> - 12/23/03

2/4/04 - 6/24/04

7/23/04 - 9/2/04

Claimant sustained two separate injuries in August and September of 2002, one to each shoulder. He began receiving TTD on 9/27/02 and those benefits continued until 5/28/03 when he was released to return to work without restrictions.

After working for a short period, claimant began having more symptoms. He returned to the treating physician, Dr. Lynch, and was given restrictions which limited his overhead work to 60 percent of the workday and his pushing pulling and lifting activities to

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<sup>1</sup> Respondent was ordered to pay TTD benefits for the period 12/24/03 to 2/3/04 and 6/25/04 to 7/22/04.

<sup>2</sup> Claimant's Brief at 13 (filed Dec. 5, 2007).

20 pounds. Dr. Lynch also recommended that claimant get a second opinion. These restrictions were relayed to respondent and claimant was reassigned to tag containers and trees, and pick up trash, a job that was thought to be within his restrictions.

Claimant worked for approximately one month, and on July 23, 2003 he determined that he was no longer able to continue due to his worsening bilateral shoulder complaints. He called and spoke to Madison, his supervisor, explaining his condition and inability to work. He continued to call in until August 12, 2003 when Madison told him there was no light duty work for him.<sup>3</sup> Claimant described the conversation as follows:

.. they got bad enough that I could not work with them. I kept them informed every single day for like the first week and a half, and then at that point I was, you know, "My shoulders aren't getting any better, you know, I'll call you in a week."

So there was another two weeks and I called them another two times or so. Then that -- I mean, that was pretty much it. Then they -- later on, when I had called Madison to check to see if there was anything that they had that I could do, she told me that she did not have anything for me to do with my shoulders and that she could no longer have me come back because there was nothing there for me to do.<sup>4</sup>

When respondent was not willing to provide another physician for a second opinion, a preliminary hearing was held. The ALJ issued an order directing respondent to set an appointment with another physician and to pay TTD benefits. Dr. Roger Hood was asked to evaluate claimant's bilateral shoulder problem and TTD was commenced as of 12/24/03 and continued until 2/3/04. As of 2/3/04, Dr. Hood issued his report with his treatment recommendations along with an opinion that claimant's shoulder problems were likely not causally related to his work activities. Based on that report, respondent terminated TTD benefits and no further treatment was provided, including that recommended by Dr. Hood.

A second preliminary hearing was held in June 2004 and the ALJ ordered respondent to provide the physical therapy outlined by Dr. Hood as well as TTD benefits commencing 6/25/04. TTD benefits were suspended when the physical therapy was completed on 7/22/04. Thereafter, claimant was released from treatment on 9/2/04 and the parties seem to agree that his entitlement to TTD benefits under any circumstances end on this day.

A regular hearing was held with the only issue being the claimant's request for additional TTD benefits from 8/1/03 to 9/2/04, less those days he was already paid TTD benefits as a result of the two earlier preliminary hearings. Distilled to their simplest terms, the parties' arguments are rather straightforward. Claimant maintains he was under Dr.

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<sup>3</sup> P.H. Trans. (Dec. 11, 2003) at 20.

<sup>4</sup> *Id.*

Lynch's restrictions which respondent could not meet and even the light duty that was provided for him caused him additional pain and increased symptoms. Respondent, on the other hand, indicates that it always had light duty available to claimant even during those periods he was paid TTD pursuant to the ALJ's preliminary hearing orders. That light duty work was within claimant's medical restrictions.

The ALJ concluded that claimant failed to meet his burden of establishing his entitlement to the TTD benefits. The Board has considered the evidence contained within the entire record and concludes the ALJ's Award, as to the issue of additional TTD benefits only, should be modified.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>5</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>6</sup>

Temporary total disability is defined in K.S.A. 44-510c(b)(2) as follows:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.

Although the ALJ's Award seems to suggest that the ALJ was uncertain as to the dates that claimant was unable to work and thus entitled to TTD, the Board finds those dates are easily ascertained. Claimant received a period of TTD from 9/27/02 to 5/28/03 when he returned to work with no restrictions. His symptoms increased and he returned to see Dr. Lynch on 6/20/03, who imposed restrictions and suggested a second opinion. Respondent attempted to honor those restrictions but claimant's symptoms continued to progress. On 7/23/03 claimant contends he was no longer able to continue working the light duty. Over the next few weeks he would call in periodically and update his supervisor, Madison, about his condition. It is uncontroverted that on 8/12/03 Madison told claimant that she had no light duty available to offer him. At that point, claimant ceased calling in to work and has not worked for respondent since that date.

After the two subsequent preliminary hearings, claimant was paid periods of TTD benefits as a result of the ALJ's orders. Other than those periods of payments, he was not paid TTD.

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<sup>5</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>6</sup> K.S.A. 44-508(g)

Respondent contends that it has always had light duty available and that claimant merely chose not to work. However, respondent's evidence of this is less than compelling. Patricia Stoffer, the respondent's bookkeeper, testified that respondent was able to accommodate Dr. Lynch's restrictions by reassigning claimant to the job of tagging trees and shrubs, performing inventory and picking up trash. However, when asked some details about the extent of the work available, claimant's effort to contact Madison about working and his physical complaints, Ms. Stoffer did not appear to be truly informed about the general availability of the work tasks and how those tasks might exceed claimant's restrictions or his physical complaints.

Leanne Follett, the human resources manager, was hired well after claimant's injury and the period in dispute. She testified that respondent ultimately made a job available to claimant that would fully accommodate his restrictions. However, this effort to get claimant back to work came in 2005 and was, no doubt, in response to the potential permanent partial general (work) disability rather than claimant's need for TTD. Ms. Follett was not employed by respondent in 2003-2004 and did not have any information relative to that period.

What is clear, and uncontroverted, is that claimant attempted light duty from 6/20/03 to 7/23/03 at which time he believes he was unable to continue. He contacted his supervisor, Madison, and told her he was unable to continue as his symptoms were increasing. He was on restrictions at that time, issued by Dr. Lynch, the authorized treating physician, and was directed to have a second opinion. That was not offered and only after a preliminary hearing, did that come to pass. There is no indication that claimant's condition improved during this time. A second preliminary hearing was required in order to get the physical therapy recommended by Dr. Hood, the physician selected to perform the second evaluation. After that period of conservative treatment, claimant's condition improved and he was released on 9/2/04. Based upon this evidence, the Board finds that there is sufficient evidence that claimant was temporarily and totally disabled from 8/12/03<sup>7</sup> and continuing until 9/2/04. Accordingly, the ALJ's Award should be modified to reflect an additional award for TTD for that period of time, less those weeks respondent has already paid pursuant to the two preliminary hearing Orders. Respondent's contention that it is entitled to a credit for those weeks already paid is specifically rejected.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated October 22, 2007, is affirmed in part and modified in part as follows:

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<sup>7</sup> This is the date claimant's brief requests ttd begin.

The claimant is entitled to 45.43 weeks of temporary total disability compensation at the rate of \$323.63 per week or \$14,702.51, making a total award of \$14,702.51.

The balance of the Award is not at issue and is therefore affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

The undersigned Board Member respectfully dissents from the majority's decision. Claimant was offered a job that was purportedly within his restrictions. If claimant's work activities in that job exceeded his restrictions or caused him additional pain the appropriate response would have been to contact his employer and ask for further modification and/or follow up with the treating physician rather than refusing to work. The job was intended to be performed in such a way that it would avoid pain or further injury to claimant. Claimant's unilateral decision to stop working the accommodated job does not, in this, member's view, create an obligation to pay TTD.

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BOARD MEMBER

c: William E. Niffen, II, Attorney for Claimant  
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge